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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,

Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS OF APPELLEE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Appellee, Department of Treasury, State of New Jersey.
Hughes Justice Complex, CN 112,
Market and New Warren Streets,
Trenton, New Jersey 08625.
(609) 292-1516

JAMES J. CIANCIA,
Assistant Attorney General,
Of Counsel.

JOSEPH L. YANNOTTI,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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v.

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MOTION TO DISMISS OF APPELLEE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY

The Appellee Department of Treasury of the State of New Jersey hereby moves to dismiss the appeal pursuant to Rule 16.1(b) on the grounds that the federal questions raised in this appeal are not substantial.

Statement of the Case

This is an appeal from a final judgment of the Supreme Court of New Jersey sustaining against constitutional challenge an affirmative action program enacted by the City of Camden in the State of New Jersey. The Camden affirmative action program applies to all construction contracts awarded by the City when the cost of the contract exceeds $50,000. The program, which was approved by the Department of Treasury of the State of New Jersey, includes a provision whereby the contractor is to make every effort to employ persons residing in the City of Camden "but, in no event, shall less than forty percent (40%) of the entire labor force be residents of the City of Camden." (App. C at 56a). The Camden program also provides that a resident of the City of Camden is any person who has been domiciled in the City for a continuous period of twelve (12) consecutive months prior to the application for employment (App. C at 38a). The Appellant United Building and Construction Trades Council of Camden County and Vicinity argued below that the resident hiring requirements contravened the Constitution of the United States, invoking the Privileges and Immunities Clause, U.S. Const., Art. IV, §2, cl. 1, the Commerce Clause, U.S. Const., Art. I, §8, and the Equal Protection Clause, U.S. Const., Amend XIV. The Supreme Court of New Jersey disagreed and this appeal followed.

In 1975, the Legislature of the State of New Jersey enacted amendments to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-31 to 38, requiring that no public works contract be awarded by the State or any of its political subdivisions unless the contractor has agreed and guaranteed "to afford equal opportunity in performance of the contract in accordance with an affirmative action program approved by the State Treasurer." N.J.S.A. 10:5-32. The State Treasurer subsequently promulgated rules

and regulations which established minimum guidelines for adequacy of affirmative action plans pertaining to construction contracts, N.J.A.C. 17:27-6.5(b), as well as minority hiring goals for each of the State's 21 counties. N.J.A.C. 17:27-7.3. The regulations permit any public agency to promulgate an affirmative action program for construction contracts as long as it meets the minimum State requirements and establishes a minority hiring goal which is not less than that established for the particular county in question. N.J.A.C. 17:27-6.5(b). Once approved by the State Treasurer, the public agency affirmative action plan applies to all construction contracts and subcontracts involving that public agency when the cost exceeds $50,000. N.J.A.C. 17:27-6.5(a).

The City of Camden in the County of Camden is one of the older urban areas in the State of New Jersey. As indicated by the results from the 1980 census, about 70% of the residents of the City are members of minority groups (App. A at 10a). The unemployment rate for the City generally averages twice or three times the national rate. Camden has one of the highest uncollectible tax rates in New Jersey. Furthermore, the residential tax base is small and consists of very modest homes. The industrial and commercial values have shrunk over the last three decades. See *Camden* v. *Skokowski*, 88 N.J. 304, 305, 441 A.2d 741, 742 (1982).

On July 24, 1980, the City Council of Camden adopted an ordinance to establish an affirmative action program for construction contracts to be performed for on or behalf of the City. The ordinance noted that its adoption was prompted by the economic conditions confronting the minority citizens of the City, and stated further that

> . . . the City Council of the City of Camden has been informed that unemployment State-wide is 8.1% and County-wide is 7.6%. The unemployment figures for

> the City of Camden, as given to the City Council by the Department of Labor of the United States, are 11.5%. However, at the last figures recorded by the State of New Jersey Department of Labor Affirmtive Action Office, unemployment among Black Americans was 18.4% and unemployment among Hispanic-American was 15.6%. The latter figures were as of the end of 1977 and the Department of Labor has informed the City Council of the City of Camden that these particular figures have increased significantly . . . [App. C at 36a-37a]

The ordinance indicated that its purpose was to relieve the problem of unemployment confronting the citizens of Camden and to promote minority involvement in construction (App. C at 37a).

The Camden ordinance established a program which satisfied the minimum State requirements and which provided that construction contractors "shall make every effort to employ not less than 25% minority workers." (App. C at 40a). This hiring goal was greater than the 20% minority hiring goal established by the State Treasurer for the County of Camden. *See* N.J.A.C. 17:27-7.3. The July 24, 1980 ordinance was amended by a second ordinance adopted on August 28, 1980. This second ordinance included a provision whereby the contractors were to "make every effort to employ persons residing within the City of Camden but in no event shall less than 40% of the entire labor force be residents of the City of Camden." (App. C at 56a). The term "resident" was defined in the July 1980 ordinance as a person who has been domiciled in the City for a "continuous period of twelve (12) consecutive months prior to the application for employment" and continues as a City resident "during the term of employment or contract." (App. C at 38a). On November 24, 1980, the

Chief Affirmative Action Officer for the State Department of Treasury approved the Camden program because it met the minimum requirements prescribed by N.J.A.C. 17:27-6.5(b) (App. D at 60a).

The Appellant appealed the Department of Treasury's approval of the Camden program to the Appellate Division of the Superior Court of New Jersey. Prior to argument or decision in the Appellate Division, the Supreme Court of New Jersey took jurisdiction of the appeal by direct certification pursuant to N.J. Court R. 2:12-1. The Appellant challenged the Camden minority hiring goal on various State statutory and constitutional grounds and maintained that the minority hiring goal was a denial of equal protection under the Fourteenth Amendment to the Constitution of the United States. The Appellant also challenged the resident hiring requirements on the basis that they violated the Privileges and Immunities Clause, U.S. Const., Art. IV, §2, cl. 1, the Commerce Clause, U.S. Const., Art. I, §8, and the Equal Protection Clause, U.S. Const., Amend. XIV.

By decision entered on February 18, 1982, the Supreme Court of New Jersey rejected all of the contentions raised by the Appellant. The Court ruled that the minority hiring goals were consistent with State statutory and constitutional law and did not violate the Equal Protection Clause.* The New Jersey Court also held that the residency hiring requirements did not contravene the Constitution of the United States (App. A at 22a-28a). Since the Camden residency preference was not aimed primarily at out-of-state residents, and since it affected New Jersey residents who did not live in Camden just as it affected

* The Appellant does not appeal from this portion of the judgment of the Supreme Court of New Jersey. See Jurisdictional Statement at 10, n.19.

residents of States other than New Jersey, the Court concluded that the hiring preference did not violate the Privileges and Immunities Clause. With respect to the Commerce Clause, the Supreme Court of New Jersey held that in adopting the hiring preference, the City of Camden was not acting in the role of a market regulator but was merely establishing the conditions of its participation in the market. Accordingly, the Court found no violation of the Commerce Clause. Finally, the Supreme Court of New Jersey sustained the resident hiring requirements against the assertion that they contravened the Equal Protection Clause, concluding that there was a rational basis for the City to adopt the limited preference for its own citizens. A Notice of Appeal dated April 22, 1982 was filed with the Court below seeking review by this Court under 28 U.S.C. §1257(c) of that portion of the judgment of the New Jersey Court sustaining the constitutionality of the resident hiring provisions of the Camden plan.

ARGUMENT

POINT I

The appeal should be dismissed because the limited hiring preference for Camden residents established by the Camden ordinance does not violate the Privileges and Immunities Clause since it establishes no preference on the basis of State residency or citizenship.

In its decision below, the Supreme Court of New Jersey concluded that the resident hiring preference of the Camden ordinance, which is limited in its application to 40% of the available jobs on construction contracts performed for or on behalf of the City of Camden, does not violate the Privileges and Immunities Clause. U.S. Const., Art. IV, §2, cl. 1 (App. A at 25a-26a). The New Jersey Court held that the Clause does not foreclose the enactment of local ordinances that favor city residents because such regulations are not aimed primarily at those who reside in states other than New Jersey. A resident hiring preference, such as that adopted by the City of Camden, affects New Jersey residents who do not reside in Camden just as it affects residents of other states. The Camden ordinance does not deny to out-of-state citizens any privilege of citizenship shared by the residents of New Jersey (App. A at 26a). Notwithstanding the Appellant's arguments to the contrary, the decision of the Supreme Court of New Jersey is entirely in accord with the fundamental purpose of the Privileges and Immunities Clause and with the decisions of this Court.

The Privileges and Immunities Clause states that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states." U.S. Const., Art. IV, §2, cl. 1. The Clause "establishes a norm

of comity," *Austin* v. *New Hampshire*, 420 U.S. 656, 660 (1975), that is to prevail "among the states with respect to their treatment of each other's residents." *Hicklin* v. *Orbeck*, 437 U.S. 518, 523-524 (1978). The purpose of the Clause is "to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship are concerned." *Paul* v. *Virginia*, 8 Wall 168, 180 (1869). The design of the Privileges and Immunities Clause was to insure that when a citizen of one state ventures into another he will enjoy the same privileges enjoyed by the citizens residing there. *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948).

The decisions of this Court make plain that the distinctions at which the Clause was aimed are those grounded upon *state* citizenship. In *Hicklin* v. *Orbeck*, *supra*, the Court held that an Alaska statute which required the employment of qualified Alaska residents in the performance of certain oil and gas related contracts in preference to residents of other states was violative of the Privileges and Immunities Clause. Similarly, in *Austin* v. *New Hampshire*, *supra*, the New Hampshire Commuter Income Tax was declared to be in violation of the Clause because it fell exclusively upon the income of nonresidents of the State of New Hampshire. *See also Toomer* v. *Witsell*, *supra*, (South Carolina statute which required nonresidents of South Carolina to pay a fee 100 times greater than that paid by residents for a commercial shrimp license violated the Privileges and Immunities Clause); *Ward* v. *Maryland*, 12 Wall. 418 (1871) (Maryland law which required those not permanent residents of Maryland to obtain a license to sell goods other than those produced or manufactured in Maryland violated the Privileges and Immunities Clause). These cases make clear that the Clause has its application only with respect to discriminatory restrictions in favor of *state* residents generally. *Hicklin* v. *Orbeck*, *supra*, 437 U.S. at 525.

The hiring preferences established in the Camden ordinance at issue in this case are not drawn on the basis of *state* citizenship but are instead based only upon municipal residency. While it is true that Camden, as a municipality, is a creature of the State of New Jersey subject to its legislative control, this does not alter the plain fact that the Camden hiring preference is one limited to Camden residents. The hiring preference is not one shared by all who are New Jersey residents. As indicated above, Camden residents may seek 100% of the available positions on construction projects undertaken for or on behalf of the City of Camden. The fact that residents of Delaware or Pennsylvania may seek only 60% of these positions is of no constitutional significance for purposes of the Privileges and Immunities Clause because this same limitation applies to New Jersey residents who do not reside in Camden. The ability to secure 100%, as opposed to 60% of the available positions, even if considered a "privilege" within the meaning of the Clause, is not a "privilege" of citizenship of New Jersey. It is not a "privilege" which is common to the citizens of New Jersey "under their Constitution and Law by virtue of their being citizens." *Paul* v. *Virginia, supra,* 8 Wall. at 180. Accordingly the Supreme Court of New Jersey was correct in its conclusion that the distinction drawn between residents and nonresidents in the Camden ordinance was not a distinction at which the Privileges and Immunities Clause was directed.*

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* The Chancery Division of the Superior Court of New Jersey declared a New Jersey statute establishing an employment preference for State citizens in public works contracts, N.J.S.A. 34:9-2, as violative of the Privileges and Immunities Clause. See *Neshaminy Constructors, Inc.* v. *Krause,* 181 N.J. Super. 367, 437 A.2d 733 (Ch. Div. 1981). That case is on appeal to the Appellate Division of the Superior Court of New Jersey. The statute in question states that preference in employment on public works construction projects "shall be given to citizens of the State of New Jersey." N.J.S.A. 34:9-2.

It is abundantly clear, therefore, that the Appellant's challenge to the residency preference of the Camden enactment is entirely without substance. Its heavy reliance upon the Court's decision in *Hicklin* v. *Orbeck, supra,* is clearly misplaced. There is no discrimination in favor of *state* residents as there was in the Alaska statute struck down in *Hicklin* v. *Orbeck, supra.* What is more, even if the Privileges and Immunities Clause is held to apply to the residency preference established by the City of Camden, the Camden residency preference is clearly distinguishable from that at issue in *Hicklin* v. *Orbeck, supra.* There Alaska had legislated a resident hiring preference with respect to certain oil or gas leases that extended, as the Court stated

> . . . to employees who have no connection whatsoever with the State's oil and gas, perform no work on State land, have no contractual relationship with the State, and receive no payment from the State. The Act goes so far as to reach suppliers who provide goods or services to subcontractors who in turn, perform work for contractors despite the fact that none of these employers may themselves have direct dealings with the State's oil or gas or ever set foot on State land . . . [*Id.*, 437 U.S. at 530]

The hiring preference at issue in this case has a direct relationship to contracts awarded by the City. It applies *solely* with respect to 40% of the employment opportunities provided by these particular contracts. The Court, in *Hicklin,* expressly recognized that the State's ownership of property or resources may provide ample justification for a State's preferring its citizens over those residing in other states. See *Baldwin* v. *Montana Fish and Game Comm'n,* 436 U.S. 371, 385 (1978). Given the City of Camden's proprietary interest in its own contracts, and the

limited nature of the hiring preference, it is clear that even if the Clause is held to apply to municipal, as opposed to state, residency classifications, this case presents no violation of the Privileges and Immunities Clause.

POINT II

The appeal should be dismissed because in adopting the limited hiring preference for City residents on City construction projects, the City was acting as a participant in the marketplace and its hiring preference does not therefore violate the Commerce Clause of the Constitution of the United States.

The Commerce Clause of the Constitution of the United States, which empowers the Congress to regulate commerce "among the several States," U.S. Const., Art. I, §8, is an expressed grant of power authorizing congressional action and, also, a restriction on permissible state regulation in the absence of a conflicting federal enactment. *Hughes* v. *Oklahoma*, 441 U.S. 322, 326 (1979). The Commerce Clause, as Justice Powell stated for the Court in *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 807 (1976), was "designed in part to prevent trade barriers that would undermined efforts of the fledging states to form a cohesive whole following their victory in the Revolution." The underlying principle of the Commerce Clause is that "our economic unit is the nation." *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 537 (1949). This principle limits the States from regulatory measures which impede "free private trade in the national marketplace." *Reeves, Inc.* v. *Stake*, 447 U.S. 529, 437 (1980).

The Court has squarely held, however, that the limitations imposed upon the States in terms of their regulation

of the marketplace do not inhere when the State acts in the capacity as a market participant. *Hughes* v. *Alexandria Scrap Corp.*, *supra*; *Reeves, Inc.* v. *Stake*, *supra*. The Court made plain in *Hughes* that "nothing in the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes* v. *Alexandria Scrap Corp.*, *supra*, 441 U.S. at 810. Similarly in *Reeves, Inc.* v. *Stake*, *supra*, the Court stated that "there is no indication of a constitutional plan to limit the ability of states themselves to operate fully in the free market." *Id.* at 437.

In *Hughes* v. *Alexandria Scrap Corp.*, *supra*, the Court rejected a Commerce Clause challenge to a Maryland statutory scheme which was designed to remove abandoned vehicles from that state's roads and junkyards. The State offered a bounty for every abandoned automobile titled in Maryland which was converted into scrap. A provision of the Maryland law imposed documentation requirements for certain vehicles upon out-of-state scrap processors which were more exacting than those imposed upon Maryland processors. The practical effect of the requirement was to limit the availability of the abandoned hulks which remained in Maryland. As a result, the movement of the hulks in interstate commerce was reduced. *Id.*, 441 U.S. at 804. The Court held that the Maryland law did not violate the Commerce Clause. The Clause did not bar a State from participation in the market and restricting its trade to its own citizens or businesses.

The distinction between market participation and market regulation recognized in *Alexandria Scrap* was reaffirmed in *Reeves, Inc.* v. *Stake*, *supra*. There the Court rejected a Commerce Clause challenge to a South Dakota policy of selling cement produced at a State owned plant solely to

residents of South Dakota in times of shortage. As a seller of cement, the State was acting a a market participant. The general rule of *Alexandria Scrap* applied. *Id.*, 447 U.S. at 440. Furthermore, the Court rejected the contention that South Dakota was engaged in protectionism:

> We find the label "protectionism" of little help in this context. The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the state was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of State educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State. [*Reeves, Inc.* v. *Stake, supra*, 447 U.S. at 442].

Similarly in *American Yearbook Co.* v. *Askew*, 339 F. Supp. 719 (M.D. Fla. 1972) (three-judge court), summarily aff'd 409 U.S. 904 (1972), the Court sustained the constitutionality of Florida statutes and regulations which required that all public printing be done in Florida. Finding no violation of the Commerce Clause, the District Court stated that, "Trading regulations are clearly subject to Commerce Clause restrictions, but statutes that merely specify the conditions of state purchases are not." *Id.* at 725. *See also People ex rel. Holland* v. *Bleigh Construction Co.*, 61 Ill. 2d 258, 335 N.E. 2d 469, 479 (1975) (Illinois statute granting preference for Illinois resi-

dents as laborers on public works projects does not violate the Commerce Clause); *City of Phoenix* v. *Superior Court*, 109 Ariz. 533, 415 P.2d 454 (1973) (statute granting 5% price advantage to bidders on public contracts who have satisfactorily performed prior public contracts and have paid Arizona state and local taxes for two years prior to bidding does not violate Commerce Clause); *K.S.B. Technical Sales Corp.* v. *North Jersey District Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774 (1977) (New Jersey statute requiring use in government purchase contracts of materials produced in the United States is not in contravention of the Commerce Clause).

In this case, the Supreme Court of New Jersey correctly determined that the City of Camden, is awarding public contracts for construction, was acting in the capacity of market participant rather than market regulator. The City is "not regulating the flow of commerce between private parties" (App. A at 22a), but is instead merely establishing the terms upon which it deals with contractors engaged for the performance of contracts with the City. The Appellant suggests that Camden is regulating the primary relationship between the City and its contractor as well as the secondary relationship between the contractors and its employees. But, the hiring preference is not a regulation of the marketplace generally, it is specifically limited to the City's own contractual arrangements and has application only to the City's participation in the marketplace. The City's action therefore falls squarely within the holdings of the Court in *Reeves* and in *Alexandria Scrap*.

The Court below correctly noted that had the City of Camden chosen to perform its own construction work rather than have the work done by private contractor it could have required "that all employees on the job

be city residents." (App. A at 24a). See *McCarthy* v. *Philadelphia Civil Service Comm'n*, 424 U.S. 645 (1976). The Appellant must concede that under *American Yearbook Co.* v. *Askew, supra*, the City could constitutionally require that all of the work be performed by Camden contractors.* Given the breadth of the recognized power to condition municipal employment upon residency, and to provide a flat preference for local contractors, it is utterly illogical to contend that the Commerce Clause forbids the City of Camden from insisting that 40% of those hired by its contractors be residents of the City. A residency requirement for municipal employment would mandate that *all* workers be City residents. Implicit in a preference for the utilization of local contractors, as was the case in *American Yearbook*, is the clear understanding that the workforce will be largely, if not entirely, made up of local residents. Here, Camden has asked only that 40% of those employed be residents of the City, and there is nothing in the Commerce Clause which would bar the City from establishing this limited and reasonable requirement.

It should be added as well that in its decision below, the Supreme Court of New Jersey took note of the serious economic plight that has befallen the City of Camden (App. A at 24a). The Court referred to its recent decision in *Camden* v. *Skokowski*, 88 N.J. 304, 441 A.2d 741 (1982), wherein it was stated:

> Camden is one of the older urban areas in the State and is afflicted with the ills typical of these centers. *Its unemployment rate generally averages*

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* Under the applicable provisions of the New Jersey Local Public Contracts Law, N.J.S.A. 40A:1-1 *et seq.*, the City of Camden would be without statutory authority to limit competition on construction contracts to resident contractors. See N.J.S.A. 40A:11-13(b).

> *two or three times the national rate;* approximately 20% of the population consists of senior citizens; it has one of the highest uncollectible tax rates in the State, more than 13% of the houses are owned by the City; the residential tax base is small and consists of very modest homes; and industrial and commercial values have steadily shrunk over the last three decades. [*Id.* at 305, 441 A.2d at 742; emphasis added].

In adopting the hiring preference, the City Council noted the serious problem of unemployment confronting its residents particularly those among the large minority population of the City (App. C at 36a-37a). The situation in the City is no less pressing than that created by the cement shortage in South Dakota, a shortage which justified that State in limiting its cement sales to its own residents. *Reeves, Inc.* v. *Stake, supra.*

In sustaining the Camden ordinance against the contention that it contravened the Commerce Clause, the Supreme Court of New Jersey correctly refused to follow the recent decision of the Supreme Judicial Court of Massachusetts in *Massachusetts Council of Construction Employers* v. *Mayor of Boston,* —— Mass. ——, 425 N.E.2d 346 (1981), *cert.* granted *sub. nom. White* v. *Massachusetts Council of Construction Employees,* —— U.S. —— 102 S.Ct. 1273 (1982), wherein the Court held that a resident preference for municipal residents for city construction projects was a violation of the Commerce Clause. The Massachusetts Court failed to give sufficient weight to the City of Boston's proprietary interest in its own construction contracts, and declared the resident preference unconstitutional despite the plain fact that the City was acting in the capacity as a market participant rather than a market regulator. The Supreme Judicial Court of Massa-

chusetts distinguished *Reeves, Inc.* v. *Stake, supra*, and held that decision inapplicable because Boston's construction projects were not undertaken solely with City funds.

The decision in *Massachusetts Council* was, as the Supreme Court of New Jersey held, a departure from the reasoning in *Reeves*. The infusion of funds from sources other than the City's treasury is merely one consideration that will, as the Court said in *Reeves*, "be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis." *Id.*, 447 U.S. at 439. The adjustment of these interests is a task "better suited for Congress than this Court." *Id.* Clearly, under *Reeves*, a local government retains the power under the Commerce Clause, absent a clear indication to the contrary from the Congress, to prefer its own residents in employment on its own construction projects despite the fact that funds other than the City's funds are being expended for the projects.

POINT III

The durational residency requirement in the Camden Ordinance is not violative of the Equal Protection Clause because it does not penalize the exercise of the right of interstate travel and is rationally related to legitimate governmental interests.

The Appellant also appeals from the portion of the judgment of the Supreme Court of New Jersey upholding the Camden resident preference against the contention that it violates the Equal Protection Clause of the Fourteenth Amendment. The Court below held that the right to seek employment on public construction projects undertaken on behalf of the City was not a fundamental right. The classification between residents and non-residents need not be

justified by a compelling state interest but would be sustained if it had a rational basis. The Supreme Court of New Jersey found such a rational basis in the severe unemployment in Camden, the need for economic revitilization and in the general principle that residents will supply an incentive for better preformance and advance the economy of the locality (App. A at 27a-28a). The decision of the Supreme Court of New Jersey is entirely consistent with the decisions of this Court.

In *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), the Court held that a state statute which denies welfare assistance to residents who have not resided in the state for one year preceding their application for assistance violated the Equal Protection Clause. U.S. Const., Amend. XIV. The durational residency requirements was viewed as penalizing those who had exercised their right to travel, and therefore could be sustained only if it served a compelling governmental interest. Notwithstanding its holding, the Court made clear that it was not establishing a rule of *per se* invalidity of durational residency requirements noting that some may be justified by compelling interests and some may not be penalties upon the exercise of the right of interstate travel. *Id.*, 398 U.S. at 638, n. 21. Durational residency requirements in the latter category would not be subject to strict scrutiny.

The Court's decisions in *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) and *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974) made clear that the exercise of the right of interstate travel will be deemed to have been penalized only if the durational residency requirement trenches upon a fundamental right or serves as a denial of a basic necessity of life. In *Dunn* v. *Blumstein, supra*, the durational residency requirement impaired the exercise of the fundamental right to vote. In *Memorial Hospital* v. *Maricopa*

County, supra, the Court concluded that medical care was, like the welfare assistance at issue in *Shapiro,* a basic necessity of life. These durational residency requirements were held violative of the Equal Protection Clause because the states had endeavored to justify the classifications on the basis of budgetary or record-keeping considerations "which were held insufficient to outweigh the constitutional claims of the individuals." *Sosna* v. *Iowa,* 419 U.S. 393, 408 (1975).

The durational residency requirement in the Camden ordinance does not impair the exercise of a fundamental right nor does it serve to deny a basic necessity of life. The ordinance permits those who have been residents of the City for a year to seek 100% of the available jobs on the Camden construction projects. Those who have resided in the City for less than a year may seek 60% of the available positions. The right to seek employment on the remaining 40% of the available positions is not, as the Supreme Court of New Jersey held, a fundamental right. In *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307 (1976), the Court held that the right of governmental employment is not a fundamental right. The right to employment can in no sense be deemed fundamental simply because the City has elected to have the work performed pursuant to contract rather than having the work performed directly.

Additionally, the inability of recently arrived residents to seek 100% as opposed to 60% by the positions on the Camden projects does not deny a basic necessity of life. As noted in *Memorial Hospital* v. *Maricopa County, supra,* the welfare payments at issue in *Shapiro* involved the immediate and pressing need for the preservation of the life and health of those unable to live without public assistance. *Id.,* 415 U.S. at 260 n.15, quoting from *Kirk* v. *Board of Regents,* 273 Cal. App.2d 430, 440, 78 Cal.

Rptr. 260, 266-267 (1969), app. dism. 396 U.S. 554 (1970). For the same reasons, the medical care affected by the durational residency requirement in *Memorial Hospital* was viewed as a basic necessity of life. *Id.* at 259. The Camden ordinance does not serve as a bar to employment generally nor does it establish an absolute bar to employment on the Camden construction projects. The right to seek employment on 100%, as opposed to 60%, of the jobs on the Camden projects simply cannot be said to involve an immediate and pressing need for the preservation of life and health.

It is clear therefore that the classifications in the Camden ordinance need not be "shown to promote a compelling governmental interest," *Shapiro* v. *Thompson*, 394 U.S. at 634. So long as Camden's durational residency requirement is rationally based it does not offend the Equal Protection Clause. *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 528 (1959). The one year durational residency requirement for the 40% hiring preference is indeed rationally based. Those entitled to the preference will have demonstrated a commitment to the City by residing there a year or more. These individuals will thereby have an incentive for better performance. Moreover, the Camden residency preference was adopted with a view towards reducing the severe unemployment of those who reside in Camden. The unemployment problem is not new to a declining urban area such as Camden. The high unemployment rates may fairly be said to reflect the joblessness of many who have resided in Camden over the years and who lack the wherewithal to travel to other places where employment opportunities are greater. Given the rate of joblessness in Camden generally, it is unreasonable to assume that the ranks of the unemployed include large numbers of

people who have recently come to seek job opportunities. It is therefore reasonable for the City to assume that its unemployment problem is one that primarily affects its long-term residents. It is rational for the City to establish a limited hiring preference with a durational residency requirement of a year because if all of the job opportunities are taken by residents new to the City, who have come solely for the purpose of working on the City projects, there will be little prospect of lessening the severe unemployment situation in the City. Clearly, it is not irrational for the City of Camden to take this limited step in endeavoring to provide its long-term citizens with a small part of the benefits that flow from City-sponsored construction projects. The City's durational residency requirement is rationally based and, therefore, does not violate the Equal Protection Clause.

In summary, none of the constitutional issues raised by this appeal are of the requisite substantiality to warrant the Court's noting probable jurisdiction. The Supreme Court of New Jersey resolved the constitutional questions consistently with the decisions of this Court. The motion to dismiss should therefore be granted. Alternatively, if the Appellant's jurisdictional statement is treated as a petition for a writ of certiorari, the petition should be denied. The insubstantiality of the federal questions asserted make clear that there are no special and important reasons to justify plenary review by the Court.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for failure to present a substantial federal question, or in the alternative, if treated as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted,

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Appellee, Department of Treasury, State of New Jersey,
Hughes Justice Complex, CN 112,
Market and New Warren Streets,
Trenton, New Jersey 08625.
(609) 292-1516

JAMES J. CIANCIA,
Assistant Attorney General,
Of Counsel.

JOSEPH L. YANNOTTI,
Deputy Attorney General,
On the Motion.